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STATE OF WISCONSIN  
COURT OF APPEALS

DISTRICT III

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2021 AP 1305-CR

SPARTACUS DEMETRIUS OUTLAW,

Defendant-Appellant.

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ON NOTICE OF APPEAL FROM A JUDGMENT OF CONVICTION AND  
ORDER DENYING POST-CONVICTION MOTION ORDERED AND  
ENTERED IN BROWN COUNTY CIRCUIT COURT, THE HONORABLE  
MARK A. HAMMER PRESIDING

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**DEFENDANT-APPELLANT'S REPLY BRIEF**

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**STATEMENT OF ISSUE**

WAS OUTLAW ENTITLED TO WITHDRAW HIS PLEA DUE TO THE  
STATE VIOLATING THE PLEA AGREEMENT BY REQUESTING A  
PRESENTENCE INVESTIGATION?

The trial court answered this question in the negative.

## STANDARD OF REVIEW

Outlaw agrees with the standard of review set forth by the State on page 10 of its brief.

## ARGUMENT

THE TRIAL COURT ERRED IN DENYING OUTLAW'S REQUEST TO WITHDRAW HIS GUILTY PLEA BECAUSE THE STATE'S ADMITTED FAILURE TO COMPLY WITH ALL THE TERMS OF THE PLEA AGREEMENT WAS INEFFECTIVE ASSISTANCE OF COUNSEL OR A MANIFEST INJUSTICE.

### *A. General principles*

Outlaw agrees with the State that the threshold question is whether the plea breach was material and substantial (page 11 of State's brief). An issue exists as to whether Attorney Tishberg could be considered ineffective since the prosecutor present at the plea hearing (ADA Teller) was not the prosecutor (ADA Saunders) with whom Tishberg negotiated. . It is unknown if there were legible notes in the State's file on the agreement not to request a PSI. Further, Tishberg must have contacted ADA Saunders about the situation later to cause Saunders to write his letter to the court changing the State's position on a PSI (41; App. 106-107)

### *B. Materiality of the breach*

Both the State and Outlaw cited the same cases[. *State v. Knox*, 213 Wis.2d 318, , 570 N.W.2d 599 (Wis. App.1997). . *State v. Bowers*, 2005 WI App 72, , 280 Wis.2d 534, 696 N.W.2d 255). and *State v. Howard*, 2001 WI App 137, 246 Wis. 2d 475, 630 N.W.2d 244 on the issue of whether a breach of a plea agreement was material and substantial and whether an inadvertent mistake could be cured.

In this case, unlike *Knox* and *Bowers*, the error was not corrected during the proceeding at which it occurred. ADA Saunders letter to the court was over two weeks after the mistake was made and after the court had already ordered a PSI. There is also no case law cited or available as to whether a provision of a plea agreement not to request a PSI is material or substantial (although the State admitted that this term of the agreement was on page 15 of State's brief) . For the reasons stated in his brief-in-chief, Outlaw submits that a request for a PSI is as material and substantial as recommendations often found in plea agreements for sentences to be concurrent rather than consecutive or other State recommendations. Such recommendations, in general, carry considerable weight with a court and, in this case, was an integral part of the bargain in which Outlaw desired to get finality at an earlier date and avoid exposing the court to more negative opinions and details about his past..

The court's statement that it would not have followed the recommendation for no PSI is irrelevant to this analysis. See *Howard*, supra at ¶ 14 (quoted more extensively with internal citations at page 9 of Outlaw's brief-in-chief). Outlaw

should have been allowed to withdraw his guilty plea. The court's denial of his motion was an erroneous exercise of discretion.

C. Outlaw did not waive plea withdrawal as his remedy.

The State argued that Outlaw ratified statement by ADA Saunders at the sentencing proceeding in which Saunders stated that Outlaw wanted to proceed in lieu of withdrawing his plea and Attorney Tishberg stated that "there was no harm in it" (page 13 of State's brief). Outlaw agrees that ineffective assistance of counsel may be the proper way to analyze it. But he disagrees with the State that a correction regarding a PSI two and one half weeks later when the wheels were already in motion for the PSI to be produced is "prompt" and not an "actionable breach" (see page 14 of State's brief).

The court's statement that it would have ordered a PSI anyway is irrelevant to the analysis as it was the State's position on a PSI that Outlaw bargained for, not the final result. The breach, which the State agrees was an important part of the plea agreement (p. 15 of State's brief) was significant and material. Outlaw should have been allowed to withdraw his plea because of ineffective assistance of counsel or manifest injustice.

## CONCLUSION

For the reasons stated above and in his brief-in-chief, the undersigned attorney requests that this court reverse the Judgment of Conviction and the order denying his post-conviction motion and remand these matters to the trial court for a trial.

Dated this 30th day of December 2021

*Electronically signed by Len Kachinsky*

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## CERTIFICATION AS TO BRIEF LENGTH

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief and appendix produced with a serif proportional spaced font. This brief has 959 words, including certifications

Dated this 30th<sup>th</sup> day of December 2021

*Electronically signed by Len Kachinsky*

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LEN KACHINSKY

### **CERTIFICATION OF ELECTRONIC FILING**

I hereby certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court of appeals by using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 30th day of December 2021

*Electronically signed by Len Kachinsky*

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LEN KACHINSKY